

distribution equipment, except at the subscribers' premises or in the uplink process to the satellite.^{46/}

Moreover, according to the legislative history of this section, "DTH [direct-to-home] satellite service is a national rather than a local service."^{47/}

The Commission itself has recognized the distinction between DTH and SMATV on many occasions. For example, the FCC has recognized that "the SMATV service operator functions much like a traditional cable operator,"^{48/} except that it does not use "any public right-of-way."^{49/} A SMATV system, like a cable system, is still "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that it designed to provide . . . video programming to multiple subscribers within a community."^{50/} Thus, on a SMATV system, the signals are received by the SMATV operator, and then processed, packaged, and distributed to the dwelling units of subscribers within a distinct community. The ultimate customers do not receive the signal "direct" from the satellite, as is the case with direct-to-home satellite service. Moreover, as Congress has recognized, DTH is a "national rather than a local service."^{51/} DTH service has subscribers scattered across the country, whereas subscribers to a SMATV system are located in a particular community. The DTH channel line-up is uniform throughout the nation, and

^{46/47} U.S.C. § 602(b)(1).

^{47/}H.R. Rep. No. 204, 104th Cong., 1st Sess. 125 (1995). The legislative history to the 1992 Cable Act also recognizes this distinction. See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 91-93 (1992).

^{48/}Rate Order at ¶ 22.

^{49/}47 U.S.C. § 522(7).

^{50/}Id. at § 522(7) (emphasis added).

^{51/}H.R. Rep. No. 204, 104th Cong., 1st Sess. 125 (1995).

does not include local broadcast signals. SMATV, on the other hand, is a local service, with a unique channel line-up on each system, almost always including a broad selection of local television stations.

Moreover, the Commission recognized the difference between SMATV and DTH only a few months ago in its Second Annual Report to Congress on the status of competition in the video marketplace.^{52/} According to the Report,

[t]here are two different types of DTH services: direct broadcast satellite ("DBS") services and home satellite dish ("HSD") services. . . . HSD users employ relatively large (4-8 foot) dishes to receive unscrambled programming for free, and scrambled programming in a secondary market from program packages that are licensed to facilitate subscribers' receipt of programming transmitted from various C-Band satellites, which is also received by cable operators and others MVPDs.^{53/}

In contrast, SMATV was part of a completely different section of competitors in the Second Annual Report. According to the Report, "the operation of a SMATV system largely resembles that of a cable system -- one or more satellite dishes and antennas receive the programming of signals; equipment combines, amplifies and processes the signals; and wires distribute the programming to individual dwelling units."^{54/} In sum, there is no rational basis for the Commission to ignore the distinction between DTH and SMATV that it clearly made only a few months ago, and any such distinction would contravene Congressional intent as well as the plain language of the statute.

^{52/}Second Annual Report, CS Docket No. 95-61, FCC 95-491 (released December 11, 1995).

^{53/}Id. at ¶ 48.

^{54/}Id. at ¶ 104.

C. Definition Of "Comparable" Programming.

Pursuant to the new effective competition test in the 1996 Act, the programming offered by the competitor must be "comparable" to the programming offered by the unaffiliated cable operator for effective competition to exist.^{55/} According to the legislative history of the 1996 Act, comparable programming means

that the video programming services should include access to at least 12 channels of programming, at least some of which are television broadcasting signals. See 47 CFR 76.905(g).^{56/}

The foregoing legislative history is inconsistent in that it specifically cites 47 CFR § 76.905(g), the Commission's existing rule regarding effective competition. According to that rule, "a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."^{57/} The Commission acknowledges this discrepancy, and tentatively concludes that the Conference Report's definition (i.e., "some. . . . television broadcasting signals") should be adopted, despite the Conference Report's clear reference to § 76.905(g).^{58/} The Commission offers no reason for its tentative conclusion.

By citing § 76.905(g), Congress could easily have intended "comparable" programming to be defined by the Commission's existing rule, i.e., at least 12 channels, including at least one nonbroadcast service. Congress specifically cited § 76.905(g) in the Conference Report's discussion of comparable programming, which is ordinarily evidence

^{55/}1996 Act at Sec. 301(b)(3).

^{56/}Conference Report at 170.

^{57/}47 C.F.R. § 76.905(g) (emphasis added).

^{58/}Cable Reform NPRM at ¶ 69.

that Congress intended this same definition to be applied.^{59/} Indeed, in enacting a statute Congress is deemed to be aware of existing relevant law and regulations.^{60/}

If, however, television broadcast signals are to be included in the definition, superstations must be counted as "broadcast signals."^{61/} The legislative history to the 1996 Act does not limit the definition of comparable programming to local (i.e., non-superstation) broadcast stations. Furthermore, the must-carry provisions of the 1992 Cable Act make a number of references to both "local" television stations and superstations.^{62/} Thus, Congress obviously knows how to distinguish local stations from superstations. Since Congress did not do so in this case, it must be assumed that Congress intended for superstations to qualify as "comparable" broadcast programming for purposes of the new effective competition test.

Moreover, if the Commission adopts the "broadcast" signal definition of comparable programming, any one broadcast station should be enough to satisfy the definition. The Conference Report mentions "at least some . . . broadcasting signals," and the Commission, in a recent rulemaking regarding commercial mobile radio service interconnection, has

^{59/}Similarly, the legislative history states that "'offer' has the same meaning given that term in the Commission's rules as in effect on the date of enactment of the bill. See 47 C.F.R. 76.905(e)." Conference Report at 170.

^{60/}Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979); Am. Fed. of Gov. Employees v. Fed. Lab. Rel. Auth., 777 F.2d 751, 755 (D.C. Cir. 1985); Service Armament Co. v. U.S., 567 F.2d 377, 380 (Ct. Cl. 1977).

^{61/}A superstation is defined as "a television broadcast station, other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier." 17 U.S.C. § 119(d)(9); 47 C.F.R. § 76.64(c)(2).

^{62/}See 47 U.S.C. § 534, 535, 325(b)(2)(D).

equated the term "at least some" with "any,"^{63/} which means one or more. Additionally, Merriam-Webster's Collegiate Dictionary defines "some" as "being one, a part, or an unspecified number of something (as a class or group) named or implied."^{64/} Even if Congress intended to say "broadcast" instead of "nonbroadcast," the Conference Report explicitly refers to 47 C.F.R. § 76.905(g), which mentions "at least one channel of nonbroadcast service." It would make no sense for Congress to refer to § 76.905(g) if it intended not only broadcast instead of nonbroadcast programming to apply, but also to require more channels of such programming than required by the Commission's existing rule. At such a point, Congress' definition would so differ from the Commission's that it would have been meaningless to cite the Commission's rule in the legislative history.^{65/} Rather, it is entirely logical to read the Conference Report to mean that if broadcast programming must be included in the 12 channel "comparable" programming definition, only one channel of such programming is necessary.

Since the cable operator will need to demonstrate that the competitor offers programming that is "comparable" to the programming provided by the cable operator, the simplest and most easily obtainable evidence of the competitor's programming offerings is its

^{63/}Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 5408, 5460 n.224 ("NPRM/NOI"), citing Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1436-37 (1994). The Second Report and Order, stated that "any switched common carrier service that is interconnected with the traditional local exchange or interexchange switched network will be defined as part of that network for purposes of our definition of 'commercial mobile radio services.'" (emphasis added). In citing to this statement, the NPRM/NOI stated that "the *CMRS Second Report* defines the term 'public switched network' broadly so that it also includes at least some CMRS providers." (emphasis added).

^{64/}Merriam-Webster's Collegiate Dictionary. Tenth Ed. (1995) at 1120 (emphasis added).

^{65/}See Board of Ed. of City Sch. Dist. of City of New York, Etc. v. Harris, 444 U.S. 130, 148-50 (1979).

channel lineup. Accordingly, inclusion of signals on the competitor's channel lineup should be prima facie evidence that such competitor offers such channels. It would be a considerable administrative burden for cable operators to provide more evidence of the competitor's signals provided, such as videotapes. Moreover, the Commission considers cable system channel lineups prima facie evidence of the channels carried by the system for purposes of certain Commission rules, such as the must-carry rules.^{66/} Thus, the Commission should accord the same significance to the channel lineups distributed by cable's competitors.

The Commission should confirm that it is not necessary for a television broadcast station to be "retransmitted" over the competitor's facilities in order for such stations to be considered "offered" by the competitor for effective competition purposes. Retransmission is only relevant to the question of whether or not the competing multichannel video program distributor is required to obtain the consent of the television broadcast station retransmitted pursuant to Section 325(b)(1) of the Communications Act.^{67/} In implementing the retransmission consent provision, the FCC has determined that a retransmission does not occur "if the broadcast signal reception service is received without a separate subscription charge and the antenna is either (1) owned by the subscriber; or (2) under the control of the subscriber and available for purchase by the subscriber upon termination of service."^{68/} The Commission indicated that its test for determining when a retransmission has occurred

^{66/}See, e.g., 47 C.F.R. §§ 76.56(e), 76.302(a) (cable operator must place a list of the television broadcast signals carried in fulfillment of must-carry obligations in its public file).

^{67/}47 U.S.C. § 325(b)(1).

^{68/}Memorandum Opinion and Order in MM Docket No. 92-259, FCC 94-251, 9 FCC Rcd 6723 (1994) at ¶ 83.

reflects a balancing between Congress' "effort to create regulatory parity between these types of operations [MMDS and SMATV] and cable systems" and "Congress' desire not to affect a viewer who receives these broadcast signals over an antenna not owned by a MVPD." ^{69/}

These purposes are unrelated to the policies underlying effective competition. While the focus of a Section 325 retransmission consent analysis is properly upon whether the rights of the local television broadcast station have been infringed by an unauthorized retransmission of its signal, the focus of an effective competition analysis is upon whether the potential customer has the ability to choose between comparable programming services offered by the local cable operator and a competing MVPD. Thus, under the new effective competition test, Congress does not require that a multichannel video program distributor "retransmit" comparable programming. Rather, Congress required only that comparable programming be "offered" by a competing multichannel video program distributor to find that effective competition exists. The use of the term "offer" is significant in that it is far broader than the term "retransmit" as used in Section 325(b).

When an MVPD takes any actions which facilitate a subscriber's receipt of off air television broadcast reception along with the other programming services provided by the MVPD, the package of services received is indistinguishable from those services which can be purchased from the local cable operator. It makes no difference whether the competing MVPD imposes a separate charge for the broadcast station retransmission or provides those services for free. Nor does it make a difference whether the subscriber or the MVPD owns or installs the antennas or A/B switches which are used to receive the television broadcast signals. All that matters is that customers have a realistic option to receive reasonably

^{69/}Id. (citations omitted).

comparable video programming service in place of cable service. Thus, Time Warner proposes a simple, easy to administer test: if the channel lineups or marketing materials of the MVPD make the subscriber reasonably aware of the ability to receive broadcast television signals along with any other programming provided by the MVPD, the comparability test should be deemed satisfied.

D. Procedural Issues.

As was the case with the 1992 Cable Act's effective competition definition, the new test added by the 1996 Act will require procedural guidelines. For example, Congress intended deregulation to be self-executing at any time on or after February 8, 1996 where the new effective competition test is satisfied. This is evident from the legislative history, which states that "[t]he test provides that effective competition exists when a telephone company or any multichannel video programming distributor is offering video programming services directly to subscribers by any means in the franchise area of an unaffiliated cable operator."^{70/} Since neither the statute nor the legislative history discuss any delay or transition period to deregulation once the test is met, no such delays should be imputed.

Accordingly, cable operators should be immediately freed from all rate regulation, including BST, CPST, tier buy through, and any rate uniformity requirements, at such time as any effective competition test is satisfied, as the operator might demonstrate in an appropriate showing filed with the Commission, with service on the affected LFAs.^{71/} Consumers will be fully protected through the Commission's authority to impose refunds and

^{70/}Conference Report at 170 (emphasis added)

^{71/}Thus, for example, a cable operator might at any time submit a showing that effective competition existed as of February 8, 1996 or any date thereafter. Such a showing would, inter alia, cut off CPST refund liability as of the date effective competition came into existence.

rollbacks if the cable operator's effective competition showing is ultimately rejected. Such treatment would be similar to the Commission's rules subjecting cable operators to liability for refunds and rollbacks of rates found to be in excess of the applicable permitted rate.^{72/}

In reviewing effective competition petitions, the Commission should rule that such petitions are deemed granted if they are either (1) accompanied by a concurrence from all certified LFAs; or (2) unopposed after the close of the applicable 30-day public notice period. If the petition is opposed, the Commission should issue a ruling within 90 days after the petition was filed. This is entirely consistent with the 1996 Act's requirement that the Commission resolve such matters in 90 days where an effective competition petition is submitted as a defense to a CPST rate complaint.^{73/} Thus, if the matter is not acted upon within 90 days, it should be deemed granted. Such a procedure would also be consistent with other provisions of the Communications Act, including Sec. 271(d)(3) (requiring the Commission to act on BOC applications to provide interLATA services within 90 days), and Sec. 653(a)(1) (requiring the Commission to act on open video systems applications within 10 days).

Once effective competition has been established, CPST rate regulation should not be subject to reinstatement due to subsequent factual changes. If, for example, an MMDS operator is affiliated with a LEC such that a cable operator is subject to effective competition but later changes its ownership structure such that there is no affiliation, rate regulation still should not apply. The 1996 Act sunsets all CPST regulation as of March 31, 1999 in order

^{72/}See 47 C.F.R. § 76.942.

^{73/}1996 Act at § 301(b)(1)(C).

to provide a smooth transition to deregulation.^{74/} Any reinstatement of regulation between now and that date, therefore, would be inherently disruptive and contrary to Congressional intent, which is to eliminate regulation, not needlessly propagate it.

II. CPST RATE COMPLAINTS

Section 301(b)(1)(C) of the 1996 Act amends the 1992 Cable Act by providing that individual subscribers may no longer file CPST rate complaints with the Commission, but rather, only franchising authorities may do so, and only after receiving subscriber complaints within 90 days after a rate increase becomes effective.^{75/} Moreover, the Commission must "issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review."^{76/} The Cable Reform NPRM incorporates this provision, adopts interim procedures governing the filing of CPST rate complaints by LFAs,^{77/} and proposes to adopt such interim rules as final.^{78/}

A. Proposed Timetable.

One key rate complaint issue not addressed by the 1996 Act is the length of time the LFA has, after receiving subscriber complaints, to file a complaint with the Commission, and the LFA's responsibilities in notifying the cable operator when it receives a complaint.^{79/}

^{74/}Id. at § 301(b)(4). See Cable Reform NPRM at ¶ 18; Rate Order at n.856.

^{75/}47 U.S.C. § 553(c).

^{76/}Id.

^{77/}Cable Reform NPRM at ¶ 20-21.

^{78/}Id. at ¶ 78.

^{79/}See id. at ¶ 79.

As the Commission has recognized, the filing of "stale complaints" should not be permitted.^{80/} Therefore, at any time the LFA receives a subscriber complaint, it should be required to supply a copy of the complaint to the affected cable operator within 10 days. This will allow the operator to determine if the complaint is valid (e.g., whether it involves a CPST rate increase as opposed to a BST increase, or whether it has been filed by a current CPST subscriber).

Upon receipt of notice from the LFA of the receipt of two valid complaints, the cable operator should be required to submit a rate justification (or an effective competition defense) within 30 days. Thereafter, if the LFA still believes that the rate increase is unjustified, the LFA should be required to file a complaint with the Commission within 120 days of the effective date of the rate increase. Such a period is much longer than the current 45-day deadline (after a complainant receives a bill from the cable operator reflecting the increased rate at issue) for filing CPST rate complaints with the Commission.^{81/} It will give LFAs at least 30 days to review the cable operator's rate justification even if the subscriber complaints are filed on the 90th day after the applicable rate increase. Thus, even "taking into account the steps that a LFA may be required to follow following the close of the 90-day window on subscriber complaints in order to file its own complaint with the Commission,"^{82/} 120 days is ample time to accomplish such steps.

^{80/}Rate Order at ¶ 333, 334.

^{81/}47 C.F.R. § 76.953(b).

^{82/}Cable Reform NPRM at ¶ 79.

The Commission should dismiss the LFA's complaint if it is not accompanied by at least two valid subscriber complaints. For example, if all but one of the subscriber complaints are withdrawn, the LFA complaint is invalid. Additionally, the cable operator should be permitted to submit an effective competition showing in lieu of a rate justification as currently provided for by the Commission.^{83/}

B. Subscriber Bill Information.

Time Warner also agrees with the Commission's proposal of "eliminating the requirement in Section 76.952 of our rules that operators must include the name, mailing address, and telephone number of the Cable Services Bureau of the Commission on monthly subscriber bills."^{84/} The only purpose of requiring such information was to help subscribers direct their complaints.^{85/} Since subscribers may no longer file complaints directly with the Commission, there is no need for cable operators to list such superfluous and potentially confusing information. Likewise, cable operators should no longer be required to list the LFA name and address on each subscriber bill, as currently required by the Commission's customer service rules,^{86/} unless requested to do so by the LFA. Such information is only relevant on bills which reflect CPST rate increases subject to the complaint window.

^{83/}See id. at ¶ 18.

^{84/}Id. at ¶ 90, citing Public Notice, Report No. CS 96-12 (February 27, 1996), which also stated that cable operators should no longer inform subscribers that they may file complaints directly with the Cable Services Bureau.

^{85/}See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, 9 FCC Rcd 4119 (1994) at ¶ 141.

^{86/}47 C.F.R. § 76.309(c)(3)(i)(6).

Section 301(g) of the 1996 Act eliminated the requirement that a cable operator provide a separate written notice to each subscriber in advance of any service and rate changes. Section 301(g) provides:

Subscriber Notice. A cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion. Notwithstanding section 623(b)(6) or any other provision of this Act, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber ^{87/}

In its Cable Reform NPRM, the Commission acknowledged that this section required changes to its rules which distinguished written notice sent to subscribers individually from other written forms of communicating such information, such as written announcements on the cable system or in the newspaper. The Commission noted that the legislative history of the 1996 Act made clear that written announcements on the cable system or in newspaper advertisements were sufficient to comply with the statutory notification requirements of the Communications Act regarding service and rate changes. Individual notices to each and every subscriber would no longer be required. The Commission has modified its rules accordingly.^{88/}

Time Warner fully concurs with the Commission's actions, which allow notice of rate and service changes to be provided by any reasonable written means, including newspaper ads or on-screen announcements. However, the Commission's proposal does not go far enough. The 1996 Act represents Congress' intent to encourage competition in the

^{87/}1996 Act at Sec. 310(g), to be codified at Communications Act, § 632(c).

^{88/}Cable Reform NPRM at ¶ 39.

marketplace for video and telecommunications services and eliminates barriers to entry into each respective line of business. The 1996 Act also evidences Congress' intent to rely, to the greatest extent possible, on competitive market forces to regulate the quality, quantity and prices of services delivered to customers by various competing service providers. In order to accomplish these goals, a level competitive playing field is essential. Where competition exists, regulatory neutrality is necessary to assure that one competitor is not artificially disadvantaged.

A level playing field requires that the Commission eliminate the requirement that cable operators provide a minimum of thirty (30) days' advance written notice of any service or price changes in those areas where the cable operator is subject to effective competition. In a competitive environment, cable operators must be allowed to respond quickly to price and service adjustments made by their competitors. Fair competition will not exist where a competitor can change its rates or services on a moment's notice, either on its own initiative or in response to a cable operator's actions, while the cable operator is precluded from responding for a minimum of thirty (30) days. Cable operators will severely be disadvantaged by having to publicly announce new rate and service initiatives thirty (30) days in advance of their implementation. Competitors will have sufficient time not only to devise a marketing strategy to respond to the cable operator's initiative, but also to put into effect their own counter strategy and pricing plans before the cable operator's changes even become effective. Accordingly, in the interest of maintaining a competitively neutral regulatory environment, the Commission should alter its rules to excuse cable operators who are subject to effective competition from any requirement to provide a minimum of thirty (30) days advance notice of any rate or service changes to their subscribers.

III. "AFFILIATE" DEFINITIONS APPLICABLE TO OVS, CABLE-TELCO BUYOUT AND PROGRAM ACCESS RULES

A. Open Video Systems.

New section 653 of the 1996 Act authorizes LECs to provide cable service over open video systems ("OVS"). Section 653 makes numerous mentions of OVS facility operators and their affiliates.^{89/} The 1996 Act does not specifically define "affiliate" in the OVS context. Thus, the Commission believes that "Section 302(a) requires that we define the term 'affiliate.'"^{90/} As explained above, the 1996 Act added a general definition of "affiliate" to Title I of the Communications Act^{91/} while retaining the preexisting affiliate definition contained in Title VI,^{92/} thus providing the Commission with discretion to fashion different affiliation tests to effectuate the varying policy goals in each specific context.

Time Warner urges the Commission to apply the Title VI definition, as embodied in the notes accompanying Section 76.501 of the Commission's rules, to ascertain "affiliates" of OVS operators. Not only are OVS operators subject to Title VI, albeit in a reduced fashion,^{93/} but the nondiscrimination requirement at the heart of OVS^{94/} is most closely related to the 1992 Cable Act's channel occupancy restrictions, which inter alia, limit "the number of channels on a cable system that can be occupied by a video programming in

^{89/}See, e.g., 47 U.S.C. § 573(b)(1)(B), (C), (E); § 573(b)(2).

^{90/}Cable Reform NPRM at ¶ 95.

^{91/}47 U.S.C. § 153(a)(33).

^{92/}Id. at § 522(2).

^{93/}Id. at § 573(c)(1).

^{94/}Id. at § 573(b)(1)(A).

which a cable operator has an attributable interest."^{95/} Since the two statutory provisions are based on the same policy of ensuring that facilities operators affiliated with video programmers "do not favor such programmers in determining carriage" on their facilities,^{96/} and since the 1992 Cable Act's channel occupancy provisions utilize the Sec. 76.501 definition of "affiliate," here "the context . . . requires" use of the same definition for OVS, rather than the Title I definition.

B. Cable-Telco Buyouts.

Section 652 of the 1996 Act generally prohibits LEC buyouts of cable operators, and vice versa, in each other's local service areas.^{97/} The prohibitions apply to LECs, cable operators, and their affiliates.^{98/} Again, however, "affiliate" is not specifically defined in this Section. Accordingly, the Commission seeks "comment regarding the definition of 'affiliate' in this context as well."^{99/} Time Warner believes that, in this case, "the context. . . requires" that the Commission use the same definition of "affiliate" as applies in other cross-ownership situations, i.e., Section 76.501 of the rules and accompanying notes. Given the elimination by Congress of the statutory cable/telephone cross-ownership ban, Time Warner sees no reason why the same affiliation test should not apply here as applies, for example, in the cable/broadcast cross-ownership context. As explained in Sec. I.A.1. of these Comments, supra, the cross-ownership rules are intended to identify situations where

^{95/}Id. at § 533(f)(1)(B).

^{96/}Id. at § 533(f)(2)(B).

^{97/}Id. at § 572(a), (b).

^{98/}Id. at § 572(a), (b).

^{99/}Cable Reform NPRM at ¶ 96.

one entity has the ability to control or influence the management of another entity, and thus there is no reason why passive or beneficial interests should be cognizable.

C. Program Access.

As the Cable Reform NPRM notes, the 1996 Act adds Title VI program access requirements for common carriers or their affiliates that provide video programming directly to subscribers.^{100/} The Commission proposes to apply its current definition of "attributable interest" in its program access rules to common carriers subject to program access requirements under the 1996 Act.^{101/}

Time Warner continues to dispute the need for or legality of program access requirements generally. The free marketplace has proven fully adequate to insure the wide availability of diverse programming sources to competing MVPDs without regulatory interference. Moreover, Time Warner continues to question the rationale for failure to include the non-voting stock or single majority shareholder exceptions to the affiliation test for the program access rules. Consistent with the policy underlying the cross ownership rules as described above, a passive investor in a programming service has no ability to influence decisions by the independent management of that programmer to sell to competing MVPDs.

With the foregoing caveats in mind, Time Warner agrees that the Commission should apply the same program access to both cable systems and LEC-affiliated programmers. Since Section 301(j) of the 1996 Act is clearly written to subject common carriers and their affiliates that provide video programming to "any provision that applies to cable operators

^{100/}Id. at ¶ 47.

^{101/}Id.

under this section . . . , " there is no reason to apply different definitions of "affiliate" to LECs and cable operators for program access purposes.

Indeed, Time Warner submits that Congress intended the Commission's existing rules to apply as a measure of LEC affiliation, rather than, for example, the new statutory definition of "affiliate" added to Title I of the Communications Act. As explained in great detail in Section I of these comments, the new statutory definition covers equity interest (or their equivalent) in excess of ten percent. Under the Title I definition, however, affiliation does not result from common officers or directors

On the other hand, the program access affiliation test set forth in Section 76.1000 of the Commission's rules states that "the definitions contained in the notes to § 76.501 of this Chapter shall be used. . . ." ^{102/} Note 2(h) to § 76.501 states, in relevant part,

[o]fficers and directors of a broadcast licensee or cable television system are considered to have a cognizable interest in the entity with which they are so associated. ^{103/}

Section 301(j) specifically carves out "two or fewer common officers or directors" from the program access affiliation test. Since neither the Title VI definition of "affiliate" nor the 1996 Act's new Title I definition of "affiliate" makes any mention of officers and directors, the language of Section 301(j) can only have been included because Congress intended to apply the Section 76.1000 affiliation definition to Section 301(j).

^{102/}47 C.F.R. §76.1000(b).

^{103/}Id. at § 76.501, Note 2(h).

IV. UNIFORM RATE REQUIREMENT

The Commission has asked for comment on its tentative conclusion that the new MDU exception to the geographically uniform rate structure requirement of the 1992 Cable Act^{104/} does not permit a cable operator to offer discounted rates to MDUs where individual residents of the MDU have the option of subscribing to the service.^{105/} Rather, the Commission suggests that lower prices will be allowed only where a "bulk discount" is negotiated by the property owner or manager on behalf of all of the residents of the MDU and service is provided to all such residents.^{106/} The Commission also seeks comment regarding whether non-uniform discounts may be offered to MDU residents who are billed individually.^{107/}

Time Warner submits that cable operators should be permitted to offer discounts to MDU residents even if some residents elect not to subscribe (i.e., the amount of the discount could be based on the percentage of residents in the MDU choose to subscribe), rather than limited to a fixed discount for the MDU as a whole. It is common industry practice to offer discounts in MDUs even without requiring 100% penetration in order to be eligible for such discounts. Residents of MDU buildings where such offers are available should be entitled to enjoy the benefits of competition.

Time Warner also urges the Commission to construe Sec. 76.984(c)(2) of the rules to allow discounts offered to MDU residents who are billed individually for their cable

^{104/}See 47 C.F.R. § 76.984(c)(2) (1996).

^{105/}Cable Reform NPRM at ¶ 98.

^{106/}Id.

^{107/}Id.

service as well as discounts that are deducted from a bulk payment by the MDU owner on behalf of all the residents thereof. The *method* of billing for cable service should not be a reason for excluding a discount rate that otherwise would be included under Section 76.984(c)(2), especially in light of the plain language of the statute, which simply states that "[b]ulk discounts to [MDUs] shall not be subject to this subsection."^{108/} Moreover, inclusion of individually billed bulk discounts in the MDU exception to the uniform rate requirement fosters competition and is in the public interest.

The Commission has also asked for comment on the meaning of the term "multiple dwelling units" as used in Section 76.984(c)(2).^{109/} Time Warner supports construing the meaning of MDUs in the rate uniformity context to correspond with the expanded private cable exemption to the definition of a cable system.^{110/} The proposed definition will make the benefits of competition available not only to residents of individual multiple unit buildings, but also to persons who live in any area served by a MVPD that is not required to have a cable franchise under the revised definition of "cable system" in the 1996 Act.

The Commission's long-standing definition of a cable system excluded facilities serving "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right of way."^{111/} This definition followed the definition in the Cable Communications Policy Act of 1984. The 1996 Act revised the definition of a cable system by amending this provision such that it

^{108/}1996 Act at Sec. 301(b)(2).

^{109/}Cable Reform NPRM at ¶ 99.

^{110/}Id.

^{111/}47 C.F.R. § 76.5(a)

now excludes "facilit[ies] that serve[] subscribers without using any public right-of-way."^{112/} The new private cable exemption, therefore, includes "all facilities located wholly on private property, without regard to the nature or common ownership of the property served,"^{113/} so long as no public rights-of-way are used to provide the service.

The effect of this expanded private cable exemption is that operators of unfranchised private cable systems (i.e., SMATV systems) may serve mobile home parks and private communities without being subject to rate regulation or local franchise requirements because their facilities do not constitute a "cable system" under the new definition of such term. In order to achieve consistency with regard to application of its rules, the Commission should construe the meaning of MDU in Sec. 301(b)(2) of the 1996 Act to correspond to this new, expanded private cable exemption to the definition of a cable system, thereby allowing cable operators to offer subscribers in buildings or developments located wholly on private property the same advantages of competition as would be available from an unfranchised SMATV operator. If private cable operators are to be free of any local franchise requirements in serving customers in mobile home parks, private housing developments, or other dwelling units where service does not require occupancy of public rights-of-way, then the franchised cable operator should be allowed to compete for such subscribers by offering volume discounts.

Finally, the Commission has asked commenters to address the standards that should be applied to determine whether a complaint alleging the existence of predatory pricing has made out a "prima facie" showing, and whether the procedures used in the adjudication of

^{112/}Id. at § 76.5(a)(2) (1996); see also Cable Reform NPRM at ¶ 54.

^{113/}Cable Reform NPRM at ¶ 99.

program access complaints should be adopted for predatory pricing complaints as well.^{114/} As an initial matter, it is beyond dispute that neither uniform rate provisions nor complaints of predatory pricing are applicable in geographic areas that are subject to effective competition.^{115/} Complaints of alleged predatory pricing by a cable operator in an MDU may only be filed in areas where effective competition to cable service does not exist.^{116/}

Time Warner generally agrees with the Commission that allegations of predatory pricing "should be made and reviewed under principles of federal antitrust law as applied and interpreted by the federal courts."^{117/} However, Time Warner notes that Congress did not intend any test adopted by the Commission as a result of this proceeding to displace purportedly aggrieved competitors' existing rights under the antitrust laws.^{118/} Rather, state and federal antitrust remedies still apply and are available for parties wishing to pursue an antitrust action alleging predatory pricing claims in a venue other than the Commission. Thus, Sec. 301(b)(2) of the 1996 Act is intended to provide an administrative procedure as an alternative method to raise the issue. It thus should be simple, and result in a "quick look" at the practices at issue in order to reach a decision faster than would result in a large-scale antitrust case. Any findings made by the Commission in its investigation of predatory

^{114/}Id. at ¶ 100.

^{115/}See 1996 Act at Sec. 301(b)(2).

^{116/}Cable Reform NPRM at ¶ 100.

^{117/}Id.

^{118/}See 1996 Act at Sec. 601(b)(1).

pricing complaints cannot be dispositive in antitrust actions brought in federal or state courts.^{119/}

Predatory pricing involves an area of law with which federal and state courts have struggled and failed to adopt any uniform policies. In Time Warner's view, there are serious separation of powers issues that prevent the Commission from picking and choosing among the various tests different Courts of Appeals (much less, different states) have adopted. Quite simply, the Commission should not strive in this proceeding to resolve all the intricacies of federal antitrust law that have caused courts to struggle over predatory pricing cases for years. Instead, the Commission should enact simple rules that are designed to address only the most egregious cases of predatory pricing, and allow those cases requiring a more traditional, full-blown antitrust analysis to be brought before appropriate federal or state courts.

A "quick look" procedure before the Commission is also required because of collateral estoppel concerns. If the Commission were to engage in a detailed study of costs, as is necessary under various standards adopted by the courts, it would be necessary for the cable operator fully to litigate the issue because of the dangers of preclusive effect. Thus, experts would be required on *both sides* to discuss what costs are appropriate parts of the calculus. This obviously would prove no more efficient or less costly for the purportedly aggrieved MVPD than the filing of an antitrust case in state or federal court.

Finally, the Commission must take into account that federal antitrust law does not proscribe predatory pricing as such. It prohibits such conduct as an element of a Section 2

^{119/}In particular, the Commission should confirm in unambiguous terms that a "*prima facie* showing" under Section 301(b)(2) of the 1992 Act does not constitute a "*prima facie* case" under Section 2 of the Sherman Act.

of the Sherman Act monopolization claim, which presupposes monopoly power or an imminent threat of such power.^{119/} If the Commission were to attempt to make a rigorous predatory pricing analysis, again to meet the concern with preclusive effect, it would be necessary for the relevant markets, both product and geographic, to be established. That also would result in lengthy expert testimony to analyze the array of substitutes subscribers have available in connection with the delivery of video programming.

With the foregoing principles in mind, Time Warner proposes that a straightforward, easy to administer "quick look" procedure be based on the average "cash flow margin" for the cable industry as set forth in the Commission's annual report to Congress on the status of competition in the video distribution business.^{120/} A *prima facie* showing of predatory pricing might be found to exist in any case where a cable operator's MDU discount, compared to the retail residential rate, is greater than the average industry cash flow margin as reported by the Commission. Because the industry cash flow margin is a reasonable surrogate for the amount that revenues exceed operating costs, any discount *less* than the industry average margin can reasonably be assumed not to be below cost. Because this involves no relevant market determinations, the Commission should make clear that the "quick look" procedure has no preclusive effect under state or federal law.^{121/}

Apart from the threshold showing requirement, a party complaining of predatory pricing should demonstrate that the MDU in question is a matter of competitive significance

^{119/}15 U.S.C. § 2. See, e.g., United States v. Grinnel Corp., 384 U.S. 563, 570-71 (1966); Abcor v. AM Int'l, Inc., 916 F.2d 924, 926 (4th Cir. 1990).

^{120/}See e.g., First Report, CS Docket 94-48, 9 FCC Rcd 7442, n.44 (1994).

^{121/}Of course, even where a threshold showing has been made under this standard, the cable operator is entitled to prove that its rates are appropriate.

in the cable operator's franchised territory. This requirement is entirely consistent with federal antitrust laws which provide that predatory pricing, standing alone, is not actionable, but rather the overall impact on competition in the marketplace must be evaluated. One way of establishing an appropriate competitive impact test would be to require that the MDUs which are the subject of the predatory pricing claim would represent 15 percent or more of total number of homes in the cable operator's franchised territory. Thus, for example, if the cable operator's franchised territory contains 100,000 homes, a pricing complaint relating to MDU buildings of less than 15,000 units would fail to satisfy the threshold showing, regardless of how low the price was. Fifteen percent is suggested on the basis of the Congressional determination, in the original 1992 Cable Act effective competition standards, that non-LEC affiliated competition that fails to achieve a 15 percent share is not significant.

The purpose of this provision is to ensure that consumers are not threatened with deprivation of the benefits of unfettered price competition unless there is some chance that such competition might have generally harmful competitive effects in the long term. The purpose of the cable price discrimination provisions in the 1992 Cable Act, as amended by the 1996 Act, is not to protect inefficient MVPDs, but rather to protect consumers from the loss of competition that would occur if all MVPDs but one left the market.^{122/} In that sense, the Congressional goal here is no different than it is for the antitrust laws: the protection of competition.^{123/} It would be unfortunate if, in the name of protecting competition, the Commission were to deprive consumers of the benefits of such competition. In light of the fact that "predatory pricing schemes are rarely tried, and even more rarely

^{122/}See, e.g., Brooke Group Ltd v. Brown & Williamson Tobacco Corporation, 509 U.S. 209 (1993), quoting Matsushita, 475 U.S. at 590-591.

^{123/}See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 488 (1977).